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11 RapidShare AG, Christian Schmid, and Bobby Chang

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California
corporation,

Plaintiff,

v.

RAPIDSHARE A.G., a corporation,
CHRISTIAN SCHMID; BOBBY
CHANG; and DOES 1 through 100,
inclusive,

Defendants.

CASE NO. 09 CV 2596 H (WMC)

DECLARATION OF LUTZ PFAFF

DATE: May 10, 2010
TIME: 10:30 a.m.
CTRM: 13
JUDGE: Hon. Marilyn L. Huff

DATE FILED:
TRIAL DATE: None Set

1 I, Lutz Pfaff, declare:

2 1. I am the Vendor Manager for RapidShare AG ("RapidShare") in Cham,
3 Switzerland. I have personal knowledge of the following facts.

4 2. I am a citizen of Germany and a resident of Steinhausen, Switzerland. My
5 native language is German, but I speak English.

6 3. As a Vendor Manager I am responsible for RapidShare's relations with its
7 resellers, who are independent contractors that sell RapidShare services to residents of
8 their respective countries. RapidShare currently has 110 resellers, only three of which
9 are located in the United States. The three U.S. resellers are located in Illinois, Nevada
10 and Florida. RapidShare has no resellers in California. RapidShare does not have an
11 affiliate marketing program.

12 4. As an Internet file-hosting service, RapidShare operates like an online
13 storage locker that hosts files of various types and sizes belonging to companies and
14 individuals who sign up to use its service. RapidShare provides a secure location for
15 users to store and access their files from anywhere that there is Internet access, without
16 having to worry that files will be inaccessible when they are needed for business, when
17 traveling or for other reasons, that files will be lost or deleted due to computer crashes or
18 other malfunctions or that users will run out of storage space (as may be the case with
19 users who seek to store their photographs and other personal files on laptop or home
20 computers).

21 5. Among other things, RapidShare offers businesses a secure and economical
22 storage alternative to buying, maintaining and repairing their own large capacity
23 computers and Internet connections to store records and materials. RapidShare also may
24 be used to make large files available to users that could not be sent by email due to size
25 limitations imposed by most Internet service provider. For example, the German edition
26 of *PC World* magazine has twice used RapidShare to host files of anti-virus software for
27 its readers to download. Similarly, the German magazine *Gamestar* has used RapidShare
28 to host patches, updates and demo versions of computer videogames.

1 6. RapidShare also makes available licensed content. RapidShare entered into
2 a worldwide license agreement with Warner Brothers in February 2009 to display movie
3 trailers on the RapidShare site. RapidShare also makes available videogame trailers,
4 patches and demos with permission of the copyright owners.

5 7. To use Rapidshare's hosting service, users upload files from their hard
6 drives or other remote locations onto servers used by RapidShare, which automatically
7 generate a unique download link (a URL) for each uploaded file. A user assigns a name
8 to an uploaded file, which is embedded within the file path of the resultant download
9 link. A download link serves the same function as a unique user name and password. A
10 user's file may only be accessed by using the unique link assigned to the file and may not
11 be downloaded -- either by the user or by third parties -- without using the link. The
12 only exception is that RapidShare's Abuse Department may access files posted by users
13 to investigate allegations of violations of abuse.

14 8. Access to files saved on RapidShare's servers is managed by users
15 themselves. When a file is uploaded, the download link is made available only to the
16 user, who in turn may keep the link confidential or provide it to third parties to access the
17 linked file.

18 9. There is no search engine or index of content on the RapidShare site. A
19 given file may only be retrieved via its corresponding download link.

20 10. Files may be downloaded from RapidShare, but generally are not publicly
21 displayed by RapidShare on its site and are not searchable on the Rapidshare site. In this
22 regard, RapidShare differs from other well-known file-hosting services such as YouTube
23 and Flickr where user files can be searched and viewed by anyone.

24 11. RapidShare likewise does not view the contents of user files (except in cases
25 when it is investigating allegations of abuse, such as allegations that an uploaded file
26 violates a third party's copyright, which are discussed below).

27 12. RapidShare does not encourage users or other third parties to engage in any
28 acts of infringement involving Perfect 10 images. In fact, RapidShare prohibits users

1 from engaging in copyright infringement, as set forth in RapidShare's Conditions of Use
2 agreement, which is posted on RapidShare's website and conditions use of RapidShare
3 accounts. Attached as Exhibit A is a true and correct copy of a printout of RapidShare's
4 Conditions Of Use, available on RapidShare's website. As set forth in the Conditions Of
5 Use, RapidShare prohibits the uploading of files, the possession and/or distribution of
6 which is illegal, and has explicitly identified files that violate third party copyrights as
7 prohibited.

8 13. RapidShare provides an email address for its Abuse Department on the
9 RapidShare.com website to allow copyright owners to provide notice of any allegedly
10 unauthorized files stored by RapidShare users. RapidShare's Abuse Department
11 responds expeditiously to takedown notices or other communications about allegedly
12 unauthorized files. RapidShare first removes files identified in a notice or other
13 communication and then proceeds to verify the allegations and look for any additional
14 potentially unauthorized files stored in that user's account. While neither users nor
15 RapidShare itself can search for files on the RapidShare site, the Abuse Department is
16 able to identify the account associated with a given download link and identify other files
17 stored in the same user account. If it appears that there may be other unauthorized files
18 stored in the account of a user who has been the subject of a complaint by a copyright
19 holder, RapidShare will simply terminate the account and block access to all files stored
20 by that user. In addition, RapidShare periodically searches through other third-party
21 websites that are known to have previously posted download links to unauthorized files
22 to search for links to files that RapidShare believes may be unauthorized, which the
23 Abuse Department then deletes.

24 14. The servers on which RapidShare operates are located in Frankfurt,
25 Germany. RapidShare has never owned, leased or even used servers located in the
26 United States

27 15. Attached as Exhibit B is a true and correct copy of a printout of a webpage
28 on RapidShare's website offering Premium Accounts to users.

5 17. RapidShare has not directly marketed its service in California or elsewhere
6 in the United States. It likewise has not placed ads in any local California newspapers,
7 magazines, or other publication.

9 I declare under penalty of perjury under the laws of the United States of America
0 that the foregoing is true and correct. Executed on March 17, 2010, in Cham,
1 Switzerland.



LUTZ PREAFF

TABLE OF EXHIBITS

1. Exhibit A RapidShare's Conditions of Use printout
2. Exhibit B RapidShare's Website Offering Premium Accounts printout
3. Exhibit C RapidShare's Webpage on User Support Telephone Number printout

Exhibit A



CONDITIONS OF USE

GENERAL TERMS AND CONDITIONS

The RapidShare AG (hereinafter: "RapidShare") renders web hosting services for its users based on the following provisions.

I. General Provisions

(1) RapidShare provides its users with an infrastructure which enables the users to save any files on Internet servers. After the saving process the respective user receives a download link with which his/her file can be downloaded worldwide via the Internet as well as a deletion link with which the file he/she has uploaded can again be deleted from the server.

(2) The files saved at RapidShare shall be treated confidentially. RapidShare does not have a search function which could help search through the RapidShare infrastructure. RapidShare does not open or view its users files; the files are neither catalogued nor listed in directories.

(3) The services offered by RapidShare are basically free of charge. However, RapidShare offers premium memberships which significantly increase the service capability and ease of use which are subject to costs.

II. Upload Regulations

(1) Basically, users may save any file at RapidShare irrespective of the file format or of the file contents. Excluded, however, are files the possession and/or circulation of which is illegal, such as

- child pornography content,
- works the download of which violates third party copyrights;
- racist or violence-glorifying works,
- instructions to criminal offences against public peace.

This list is not conclusive.

(2) RapidShare will block access to such contents immediately after obtaining knowledge thereof and will delete them after an examination phase of 14 days. Furthermore, it will delete files which are identical to previously deleted files.

(3) With regard to users who violate these upload regulations, RapidShare is entitled to terminate the contractual relationship without notice, to block the access of the respective users to its services and/or to delete accounts of such users including all contents.

III. Free Use

(1) RapidShare provides its free users with line and memory capacity at its sole discretion. It is entitled to temporarily disallow the saving of new files, to determine limitations regarding the maximum possible file size, to have the download of files only started after a waiting period, to adapt the rate of transmission to the visitor traffic and to limit the amount of the maximum permissible downloads per file. RapidShare points out that in order to clean up its hard drives it deletes such files which were uploaded by free users and which were not accessed for a time period of 60 days.

(2) Users of the RapidShare infrastructure have the opportunity of registering so-called "Collector's Accounts". Free users can upgrade the functionality of the RapidShare services by means of those Collector's Accounts and can have all files which have been uploaded via this account displayed and managed. Collector's Accounts which do not contain any files are automatically deleted if there has not been a login for a period of 30 days.

IV. Premium Membership

(1) Apart from the free use indicated under section III, users of the RapidShare infrastructure have the opportunity of establishing premium memberships subject to costs with which they can make use of additional services.

(2) RapidShare shall - for the duration of his/her premium membership - provide each user with web space in which the user can save his/her own files. Automatic file deletions according to section III (1) sentence 3 do not take place for premium users for as long as the data saved for a user does not exceed the total amount of 50 gigabytes. Furthermore, RapidShare offers its premium users the opportunity of downloading without a waiting period and at a maximum speed a data volume of 5 gigabytes (□ Download-Traffic □) on a calendar day basis. RapidShare will increase each premium users □ Download-Traffic by 5 gigabytes per calendar day, regardless of a user's consumption of Download-Traffic. The total amount of Download-Traffic cannot exceed 25 gigabytes per calendar day

(3) The run-time for new premium memberships begins as soon as the user has logged on in his/her membership area (Premium Account) for the first time, however at the latest 21 days after the membership has been established. Premium users are obligated not to reveal the user names and passwords which are communicated to them. A transmission of user names and passwords to third parties is prohibited. A businesslike resale of premium memberships is only permitted with the consent of RapidShare. RapidShare reserves the right to disable memberships which are used directly or indirectly by several

persons or which have been resold in a businesslike manner without the consent of RapidShare. RapidShare will not compensate damages caused by users who give away their passwords to third parties and/or by hackers who steal personal data/passwords from users.

(4) RapidShare would only like to render its services to customers who have made a conscious choice of becoming a member. Therefore, premium memberships are not automatically prolonged but rather end with the expiration of the booked time period without a cancellation being necessary. However, RapidShare reminds its premium users via email of an upcoming expiration of premium memberships and offers users the opportunity of prolonging their membership.

V. Payment

(1) For the acquisition of a premium membership RapidShare offers its customers the possibility to settle the accruing fee for the membership by resorting to the payment service provider PayPal, via bank transfer or via their telephone bill by the way of the PayByCall procedure.

(2) Users who choose payment via the service provider PayPal will be transferred to an SSL encrypted website at which they can authorise the payment via an already existing PayPal account or via credit card. Afterwards PayPal will transfer the user back to the website of RapidShare. As soon as PayPal has confirmed the receipt of payment to RapidShare, RapidShare will indicate the user's access data in the browser and will send it to him/her via email. Direct payment via credit card without a PayPal account may temporarily be deactivated. In such a case, a PayPal account must be registered for the payment.

(3) To users who choose payment via their telephone bill by means of the PayByCall procedure RapidShare will display a website in which premium rate service telephone numbers for various countries and the respective charges per minute are indicated. In order to acquire a premium membership via the PayByCall procedure, the user will be required to keep the website displayed by RapidShare open, to then call the premium rate service telephone number valid for his/her country and to maintain the phone connection until it is automatically disconnected. After the telephone call has been concluded, RapidShare will display a new website on which the user shall be informed of the access data for his/her Premium Account. RapidShare explicitly points out that PayByCall is not available in all countries.

(4) To users who choose payment via bank transfer a website containing instructions for the payment procedure will be displayed by RapidShare. RapidShare explicitly points out that the email address at which the user is to be informed of the access data for his/her Premium Account must be indicated within the reference of a bank transfer. Bank fees relating to the bank transfer, in particular costs for foreign bank transfers, shall be borne by the user. RapidShare will activate the Premium Account only after receipt of the full membership fee in its bank account.

(5) RapidShare explicitly points out that it will immediately block premium memberships if the payments made for these memberships are back posted, if debit balances or credit card charges fall through or if payment service providers preventively back post a payment due to irregularities. RapidShare is not in a position to clarify the reasons for back postings and it will refer the user to his/her bank or the payment provider which he/she has selected in cases of such payment difficulties.

VI. Reseller

(1) In many countries the payment of Premium Accounts is not possible by the payment methods stated under section V.. Therefore, in such countries, RapidShare cooperates with resellers who sell premium memberships on their own behalf and on their own account. You can find a list of the resellers authorised by RapidShare here: [Reseller](#)

(2) RapidShare points out that resellers are not employees of RapidShare and do not conclude any contracts on behalf of RapidShare. Users who acquire premium memberships for RapidShare via resellers enter into a contractual relationship solely with their respective reseller. RapidShare will not attend to any support enquiries which refer to the payment procedures with resellers.

(3) RapidShare points out that there are various persons and companies who/which are not authorised resellers who/which nevertheless pretend to be selling premium memberships on account of RapidShare. RapidShare does not assume any support for premium memberships which have been acquired from such third parties, neither in regard to the payment procedure nor in regard to the validity period or the functional capability of those premium memberships offered by such third parties.

VII. Availability; Data Security

(1) RapidShare will provide the functions stated under section I. (1), in principle, 24 hours a day and seven days a week, however, only with a guaranteed availability rate of 99.5% as a monthly average. Excluded hereof are time periods in which the servers are not accessible via the Internet due to technical or other problems which are not within RapidShare's control (third party fault, force majeure, etc.).

(2) RapidShare strives to organise maintenance work as quickly as possible. RapidShare will limit the access to its service temporarily only in the event that the security or the functional capability of the network operations requires it imperatively. Should such limitations become necessary (for instance in order to defend against hacker attacks), RapidShare will immediately inform its users about the background of this limitation. Should it be foreseeable that downtimes for maintenance or software updates take longer than three hours, RapidShare will inform its users of this at least three days before executing the respective work.

VIII. RapidPoints

(1) RapidShare appreciates it when users apply its service to send files to third parties. Therefore, as a basic principle RapidShare credits every user of a Premium or Collector's Account with one point ("RapidPoint") as soon as one of the uploaded files from this user is downloaded by a third party. Particulars regarding the evaluation and counting system and further information about which conditions a file must fulfil in order to participate in the RapidPoint Programme can be found here: [FAQ](#)

(2) RapidPoints which have been collected at RapidShare can be exchanged for a Premium Account or a bonus which RapidShare presents on the subpage "Rewards". Cash payment of the RapidPoints value is excluded. RapidPoints, the Premium Accounts established with RapidPoints and the claims for delivery of bonuses are not transferable to third parties.

(3) RapidShare randomly examines whether the credited RapidPoints on the points account were acquired in accordance with the terms of use, in particular before exchanging the RapidPoints for bonuses. RapidShare reserves the right to exclude users from the Rewards Programme and to take further action if it has proof or a reasonable suspicion that the RapidPoints credited to the user's account were acquired by violating the terms of use. This applies in particular, but not limited to, if

- (a) files which violate the copyrights of third parties are offered for download;
- (b) users download files which they have uploaded themselves;

(c) downloads are only executed for the purpose of receiving RapidPoints or rather generating them for a third party.

IX. Miscellaneous

(1) RapidShare will inform the users of Premium and Collector's Accounts via email about amendments to the General Terms and Conditions before they come into effect. In the event that amendments have been effected to the user's disadvantage, he/she is entitled to cancel the contractual relationship within a time limit of four weeks as of receipt of the notification of change provided that his/her premium membership does not end before the legal validity of the altered General Terms and Conditions. Should the user not make use of his/her right of cancellation, the alterations are presumed to be accepted and become an effective integral part of the contract. When communicating newly composed GTC, RapidShare is obligated to again specifically point out this provision to its Premium and Collector's Account users.

(2) Should a term of the contract or a provision of the General Terms and Conditions be or become entirely or partially ineffective, this shall not affect the validity of the rest of the contract or the General Terms and Conditions. In lieu of the invalid condition such valid provision shall be incorporated as shall best approximate the actual purpose of the stipulated condition. The same shall also apply should any omission in the agreement become apparent.

Cham, Jan. 2009

At violation of our Conditions of use, we are authorized to block your access and delete your files. If you write programs aiming to violate our Conditions of Use, you will be prosecuted and made liable for any losses occurred.

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Exhibit B

[Home](#) | [News](#) | [Premium Zone](#) | [Free Zone](#) | [RapidTainment](#) | [RapidTools](#) | [Support](#) | [RapidShare AG](#) | [Privacy Policy](#)



BECOME A PREMIUM MEMBER | BENEFITS

New Account

1. Select your account
2. Payment options
3. Activation

Now choose your new Premium Account

- ✓ No waiting time before downloading
- ✓ Maximum download speeds
- ✓ Up- and download up to 2GB sized files

[See all features](#)

30 days Premium

23 Cents per day
inc. 1000 RapidPoints

€6⁹⁹

[continue](#)

90 days Premium

Save 17%!
19 Cents per day
inc. 3000 RapidPoints

€16⁹⁹

[continue](#)

180 days Premium

Save 26%!
17 Cents per day
inc. 6000 RapidPoints

€29⁹⁹

[continue](#)

365 days Premium

Save 34%!
15 Cents per day
inc. 12000 RapidPoints

€54⁹⁹

[continue](#)

* Our recommendation: With the 90 days account you do not make any long term commitments, but still save 17% in comparison with a 30 days account

More: [New Account](#) | [Extend Account](#) | [TrafficShare](#)

Additional notes

- ✓ **No subscription**
Premium accounts expire automatically. You just pay for the time you selected and have no further obligations.
- ✓ **Additional traffic, flexible**
You can purchase additional download traffic any time, it only takes a couple of minutes.
- ✓ **TrafficShare function**
TrafficShare enables you to provide other users with your files in a simple and professional way.

Our aim is to have loyal customers who choose RapidShare with conviction. Therefore we do not extend your account automatically, but leave the choice to you.

If you have problems with the payment process, please contact our Support.

If you purchased your access from a Reseller, please contact the respective Reseller for support requests.

The [Conditions of use](#) and the [Privacy Policy](#) are binding part of the agreement.

Extend a Premium Account

If you want to extend your Premium Account, please click below or in the Premium Zone on "extend account".

[Extend Premium Account](#)

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Exhibit C

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SUPPORT | CONTACT

Telephone Support

When fast is not fast enough, you can contact our telephone support in urgent cases. Our friendly experts are happy to help you. You can call us on the following number:



Tel.: +41 41 748 78 80

This department is available Monday to Friday between 08:00 and 05:00 CET
and Saturday to Sunday between 10:00 and 19:00 CET.

Mail Support

In order to ensure that your e-mails are processed speedily and without complications, please note the following points:

- The fastest way to get help is to read our [FAQ](#). You will find most of your questions answered there.
- Please read everything carefully and also look at our news page. Many questions can be answered in this way.
- If you still require help, write an e-mail to **support @rapidshare.com**. We offer support in German and English.

What we need to know in case of technical questions

The more precise and compact the presentation of the problem is, the faster we will be able to help you.

The following information is required:

"I see an error message when I try to log in: [text of the message]"

My user data are: [Enter data]

I use this browser [e.g. Firefox, Internet Explorer] and this operating system:
[e.g. Windows Vista, Windows XP, Macintosh, Linux]"

The most important information is the ones regarding the **error message** and your **user data**.

What we need to know to help with questions regarding account and payment status

In case of payments via Paypal or e-check

- First name and surname
- E-mail address
- Login ID
- Transaction ID (You will find it on the Paypal page)
- Date of the creation of the Premium Account
- Date of payment

In case of bank transfer

- First name and surname
- Login ID
- Reason for payment/payment memo
- Date of payment

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